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No. 00-261

In the Supreme Court of the United States

STATE OF NEW YORK EX REL.
ATTORNEY GENERAL ELIOT SPITZER, ET AL.,
PETITIONERS

v.

MICROSOFT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The petition for a writ of certiorari before judgment presents the same issues that Microsoft Corporation has presented in its jurisdictional statement (No. 00-139):

1. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by engaging in a course of exclusionary conduct to protect and maintain its personal computer (PC) operating system monopoly.

2. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the market for Web browsers.

3. Whether the district court erred in holding that Microsoft violated Section 1 of the Sherman Act, 15 U.S.C. 1, by tying its Internet Explorer Web browser to its Windows operating system through contracts and technological artifices.

4. Whether any of the district court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment.

5. Whether the district court abused its discretion by ordering structural separation of Microsoft into two entities and transitional restrictions on its conduct.

6. Whether the district court erred in dismissing Microsoft's counterclaim under 42 U.S.C. 1983, alleging that state attorneys general, under color of state law, sought relief in this case that would deprive Microsoft of its rights under federal copyright law.

7. Whether the district judge's extrajudicial comments about the case require reversal of the judgment.

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OPINIONS BELOW

The findings of fact of the district court are reported at 84 F. Supp. 2d 9 (J.S. App. 46-246).[1] The conclusions of law of the district court are reported at 87 F. Supp. 2d 30 (J.S. App. 1-43). The final judgment of the district court is reported at 97 F. Supp. 2d 59 (J.S. App. 253-279). The order of the district court certifying the case under the Expediting Act (J.S. App. 284-285) is not yet reported.

[1] "J.S. App." refers to the appendix to the jurisdictional statement filed in No. 00-139. See Pet. 1 n.1.

JURISDICTION

The judgment of the district court was entered on June 7, 2000. A notice of appeal was filed on June 13, 2000, and the case was docketed in the court of appeals on that date (D.C. Cir., No. 00-5213). Petitioners filed a petition for writ of certiorari before judgment on August 16, 2000. 28 U.S.C. 2101(e). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed a civil complaint in the United States District Court for the District of Columbia alleging that Microsoft Corporation has engaged in an anticompetitive course of conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. At Microsoft's request, the district court consolidated the case "for all purposes" with a similar case brought by 20 States and the District of Columbia. See Nos. 98-1232 & 98-1233 Order (May 22, 1998). Following a 78-day trial, the court entered a single set of findings of fact (J.S. App. 46-246) and conclusions of law (*id.* at 1-43), in which the court held that Microsoft had violated Sections 1 and 2 of the Sherman Act and comparable state antitrust statutes. The court entered a single final judgment, requiring Microsoft to submit a plan to reorganize itself into two separate corporate entities and to comply with transitional injunctive provisions. *Id.* at 253-279; see Brief for the United States in Response to the Jurisdictional Statement 1-12 (00-139 U.S. Br.).

Microsoft filed two notices of appeal, one pertaining to the United States' action and one pertaining to the States' action. J.S. App. 280-283. On joint motion of the United States and the State plaintiffs, the district court certified, pursuant to the Expediting Act of 1903, as

amended, 15 U.S.C. 29(b), "that immediate consideration by the Supreme Court of the appeal taken herein is of general public importance in the administration of justice." J.S. App. 284. At Microsoft's request, the district court stayed the judgment pending appeal. *Id.* at 285. Microsoft has filed a single jurisdictional statement identifying both the United States and the States as appellees.[2]

Microsoft is opposed to expedition of its appeal. Among its objections, Microsoft argues that, even though the district court consolidated the federal and state actions and entered a single judgment, the Expediting Act authorizes the Court to accept jurisdiction over the appeal only insofar as it challenges the judgment on the United States' action. Microsoft contends that the States, consequently, are not entitled to participate as appellees in this Court. J.S. 27. The United States and the States disagree. See 00-139 U.S. Br. 29 n.30; 00-139 States' Response to Microsoft's Jurisdictional Statement 5-12 (00-139 States' Response). But as a precautionary measure, the States have also filed a petition for writ of certiorari before judgment, which is the subject of this brief. The States urge that, if this Court concludes that the Expediting Act does not authorize the Court to accept jurisdiction over Microsoft's appeal insofar as it challenges the judgment on the States' action, the Court should allow the States to participate in the proceedings in this Court by granting the petition and consolidating the case on writ of certiorari with the case on appeal.

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[2] The court of appeals suspended proceedings on Microsoft's appeal pending this Court's action on the jurisdictional statement. See Nos. 00-5212 & 00-5213 Orders (June 19, 2000).

ARGUMENT

1. The United States submits that Microsoft's appeal from the district court judgment, which grants the United States equitable relief under the Sherman Act, 15 U.S.C. 1, 2, presents a matter of "general public importance in the administration of justice" within the meaning of the Expediting Act, 15 U.S.C. 29(b). This Court should therefore note probable jurisdiction and undertake direct review of that judgment. See 00-139 U.S. Br. 13-30. If the Court does so, the Court should allow the States to participate as appellees. The district court consolidated the United States' antitrust action with the States' antitrust action, and the court conducted a single trial and entered a single judgment that granted the States identical equitable relief under the Sherman Act and analogous state antitrust laws. In the circumstances presented here, the States were "parties to the proceeding in the district court." Sup. Ct. R. 18.2. They are therefore entitled to participate in the proceedings before this Court and to defend the district court's judgment. Cf. *United States* v. *AT&T Co.*, 714 F.2d 178, 182 (D.C. Cir. 1983) ("upon certification all parties, including intervenors, must pursue *all* matters on appeal to the Supreme Court").

2. If the Court agrees that the appeal meets the Expediting Act's criterion, but concludes that the Expediting Act does not permit the States to participate as appellees, the Court should review the judgment rendered on the States' complaint simultaneously through the mechanism of a writ of certiorari before judgment in the court of appeals. See 28 U.S.C. 1254(1), 2101(e). This Court's rules provide that certiorari before judgment is available "upon a showing that the case is of such imperative public importance as to

justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. That standard is satisfied here.[3]

As we have explained in our response to Microsoft's jurisdictional statement, Microsoft's appeal from the district court judgment presents a matter of general public importance in the administration of justice that warrants direct review by this Court. See 00-139 U.S. Br. 13-18. That judgment embraces both the United States' action and the States' action, which were consolidated precisely because they raise similar claims and present essentially identical issues. Given the close relationship between the United States' action and the States' action, the Court is justified in departing from "normal appellate practice" and granting the writ to ensure that the United States' action and the States' action remain consolidated for purposes of appeal.

The Court has granted certiorari before judgment "not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals." Robert L. Stern et al., *Supreme Court Practice* 42 (7th ed. 1993). Indeed, the Court has done so a number of times. See, *e.g.*, *National Org. for Women, Inc.* v. *Idaho*, 455 U.S. 918 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 n.1 (1963); *Taylor* v. *McElroy*, 360 U.S. 709,

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[3] The Court's power to grant certiorari before judgment extends to petitions filed by the party that prevailed in the district court. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 688-687, 690 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935).

710 (1959); *Reid* v. *Covert*, 354 U.S. 1, 4-5 (1957); *Brown* v. *Board of Educ.*, 344 U.S. 1, 3 (1952); see also *Roe* v. *Wade*, 410 U.S. 113, 123 (1973) (noting that a petition for certiorari before judgment would have been "preferable" to obtain review of issues relating to declaratory relief that were "necessarily identical" to issues raised on appeal of injunctive relief).

Certiorari before judgment would be particularly appropriate here in light of the fact that the United States' action and the States' action were consolidated below and resulted in a single final judgment that awarded the United States and the States the same injunctive relief. Because the issues on appeal are essentially identical, this Court's decision would necessarily control the outcome of any proceedings in the court of appeals and, as a practical matter, constrain the court of appeals from taking any independent action. See *Clinton* v. *City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (certiorari before judgment would be appropriate "[i]n light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals").

The States have been significant participants in the proceedings below and have an important perspective on the issues. By granting the States' petition and consolidating the case on certiorari with the case on appeal, the Court would ensure that it has the benefit of the views of all of the parties that participated in the district court proceedings.[4]

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[4] Of course, the States should remain aligned with appellee United States for purposes of the submission of briefs on the merits on Microsoft's appeal from the district court's judgment.

CONCLUSION

If the Court notes probable jurisdiction under the Expediting Act in No. 00-139, but concludes that the States are not properly appellees in that case, the Court should grant the petition for certiorari before judgment.

Respectfully submitted.

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